UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

USPROTECT CORPORATION

Employer

and

Cases 5-RC-15775
5-RC-15776

UNITED UNION OF SECURITY GUARDS

Petitioner

DECISION AND ORDER

The sole issue in this proceeding is whether the petitions filed by Petitioner United Union of Security Guards ("Petitioner") on September 2, 2004 to become the exclusive bargaining representative of two bargaining units of employees employed by USProtect Corporation ("Employer") at two Social Security Administration ("SSA") facilities are barred by the contract bar doctrine.[1]

The Petitioner in Case 5-RC-15775 seeks to represent a bargaining unit of security guards employed by the Employer at SSA's Metro West facility located in Baltimore, Maryland. In Case 5-RC-15776, the Petitioner seeks to represent a bargaining unit of security guards employed at the SSA's Main facility located in Woodlawn, Maryland.

The International Union, Security Police and Fire Professionals of America ("Intervenor" or "SPFPA") intervened in this matter. It asserts that an election may not be properly directed based on the fact that the SPFPA is the incumbent labor organization and has collective-bargaining agreements with the petitioned-for bargaining units at both locations.

I have carefully considered the evidence and arguments presented by the parties on this issue. As discussed below, I conclude that the petitions are barred by the extant collective-bargaining agreements between SPFPA and the Employer.

The Petitioner presented four witnesses at the hearing, each of whom is employed as a security officer by the Employer: Vera Lyn Ballard, Joseph Lee Barksdale, Reva Denton, and James Michael Turner. The Intervenor presented three witnesses: Howard

[1] The names of the parties appear as amended at the hearing.

Johannssen, SPFPA senior advisor to the president,[2] and security officers Reco El-Amin and Vida Hill.

BACKGROUND/OVERVIEW

The Employer, a Maryland corporation, is engaged in the business of providing security services to various customers, including the Social Security Administration, an agency of the United States Government, at both its Baltimore and Woodlawn, Maryland facilities. During the past 12 months, the Employer provided services valued in excess of $50,000 to the Social Security Administration at each of these facilities and during the same time period, the Employer purchased and received goods and materials valued in excess of $5,000 at these facilities directly from points located outside the State of Maryland.

On October 3, 2002, I issued a Decision and Direction of Election in Case 5-RC-15457 following the filing of a petition by the Federation of Police, Security and Correction Officers, AFSPA (FOPSCO). In that Decision, I directed an election in the same bargaining unit of security officers employed at the SSA Main facility that is the subject of the present petition in Case 5-RC-15776. At that time, the employees in this bargaining unit were employed by Holiday International Security Company ("Holiday International"). FOPSCO prevailed in the election and shortly thereafter, it was certified as the bargaining unit's exclusive collective-bargaining representative. On April 30, 2003, FOPSCO and Holiday International agreed to the terms of a collective-bargaining agreement. The term of that agreement was May 1, 2003 to June 5, 2007.

Subsequently, FOPSCO filed a petition in Case 5-CA-15474 seeking to represent the same bargaining unit of security officers at the SSA Metro West Facility, who were likewise employed by Holiday International, that is the subject of the present petition in Case 5-RC-15775. The parties entered into a stipulated election agreement and on November 8, 2002, FOPSCO prevailed in the election. On November 18, 2002, FOPSCO was certified as the bargaining unit's exclusive collective-bargaining representative. Thereafter, on September 18, 2003, the parties agreed to the terms of a collective-bargaining agreement. The expiration of that agreement is October 1, 2007.

In or around July or August of 2003, Holiday International changed its name to USProtect. Aside from a change to the patches on the uniforms worn by the security officers, however, the impact on the bargaining unit employees was minimal. There were no changes to the employees' wages, hours, or working conditions, nor did the complement of, or work performed by, the employees in either bargaining unit change as a result.

[2] Johannssen was formerly the national president of the Federation of Police, Security and Correction Officers, AFSPA, until its merger with SPFPA, as explained more fully below.

On or about May 1, 2004, FOPSCO and SPFPA entered into an agreement whereby the two unions merged. By the terms of this merger agreement, FOPSCO was dissolved and its local unions became SPFPA local unions to be governed by SPFPA's constitution and by-laws. The merged entity would thereafter be known as SPFPA.

Negotiations for the merger of the two unions began in or around May of 2002. After a series of discussions between officials from both unions, the SPFPA Board voted in August of 2003 to support the merger. On December 13, 2003, FOPSCO held a membership meeting at the Maritime Technical Institute in Linthicum, Maryland. This meeting was the first of several membership meetings at which the merger plans were discussed with the FOPSCO members. In addition, FOPSCO sent two letters to its members in or around March of 2004 in which it updated the members on the status of the proposed merger and explained that the members would be receiving a ballot by mail with which they could cast their vote in the merger election.

The SPFPA contracted with Election Services Corporation (ESC), a company that conducts elections for both unions and other organizations, to conduct the merger election. After providing ESC with the names and addresses of all dues paying members from both the SSA Main and Metro West facilities, ESC conducted a secret mail ballot election utilizing a double envelope system, *i.e.*, each member was sent one envelope containing the ballot and voting instructions, and a second, postage-paid envelope in which to return the ballot. The ballots were mailed to 1378 union members on April 9, 2004. They were instructed to cast their ballots and return them to ESC no later than 9:00 a.m. on April 30, 2004.

At 10:00 a.m. on April 30, 2004, a count of the ballots was conducted at ESC's offices located in Garden City, New York. By a vote of 392 to 62, the eligible voters voted in favor of the merger between FOPSCO and SPFPA. On May 20, 2004, ESC issued a certification of the election.

During the month of April 2004, while the election was being conducted, USProtect and FOPSCO finalized negotiations for a modified or substitute collective-bargaining agreement concerning the SSA Main facility bargaining unit, notwithstanding the fact that a collective-bargaining agreement was already in effect. The modified agreement [3] was agreed upon on April 19, 2004. By the express terms of the agreement, it was made retroactively effective to April 30, 2003 (the effective date of the prior agreement), through June 5, 2007 (the same expiration date as the prior contract). The parties signed the agreement on May 3, 2004.

[3] The uncontradicted testimony is that the parties mutually agreed to make modifications to several provisions of the existing collection-bargaining agreement at SSA Main that had resulted in the filing of multiple employee grievances. In all other respects, the agreements were identical.

ANALYSIS

Under the Board's longstanding policy, a collective-bargaining agreement will serve as a bar to a representation petition where the agreement is in writing, signed by all parties before the rival petition is filed, contains substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship, and encompasses an appropriate unit. *Appalachian Shale Products Co*., 121 NLRB 1160 (1958).

In the present case, the Petitioner asserts that there is no contract bar to the processing of its petitions. Initially, the Petitioner contends that because the modified collective-bargaining agreement between FOPSCO and the Employer covering the SSA Main facility was executed on May 3, 2004--two days after FOPSCO merged with SPFPA--FOPSCO was a defunct labor organization and could not legitimately enter into any contract with any employer. Consequently, according to the Petitioner, the contract is a nullity and the Intervenor cannot assert the agreement as a bar to its petition for the security guards at the SSA Main facility.

The proper standard for determining whether a union is defunct was set forth by the Board in *Hershey Chocolate Corp*., 121 NLRB 901 (1958):

> The Board has consistently held, and no reason appears to reach a different conclusion now, that a representative is defunct, and its contract is not a bar, if it is unable or unwilling to represent the employees. However, mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees.

121 NLRB at 911.

The Petitioner has presented no evidence that either FOPSCO or SPFPA, the union with which it merged, was at any time unable or unwilling to represent the employees covered by the SSA Main facility collective-bargaining agreement. On the contrary, the evidence discloses that FOPSCO had every intention to continue its representation of the bargaining unit employees and provided for such in the merger agreement with the SPFPA. The terms of this agreement specifically state, *inter alia*, that "[a]ll FOPSCO units shall continue their relationship with all employers of all security officers of such employers, and all officers, committeepersons, stewards and representatives of such units shall continue all representation and collective bargaining functions with such employers." Intervenor Exhibit I-11A at p. 2. Furthermore, the modified collective-bargaining agreement clearly states that the parties agreed the contract would be effective retroactive to April 30, 2003. In these circumstances, the evidence does not support a finding that FOPSCO was defunct (and the contract not a bar) under the Board's holding in *Hershey Chocolate.*

The Petitioner next asserts that there is no contract bar on the ground that the collective-bargaining agreement pertaining to the SSA Main facility was never ratified by

the bargaining unit employees as required by the SPFPA constitution. With respect to the validity of a collective-bargaining agreement in the absence of a ratification vote, however, the Board in *Appalachian Shale* held as follows:

> Where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.

121 NLRB at 1163.

In light of the Board's holding, the Petitioner's argument that the collective-bargaining agreement is invalid because it was never ratified and, thus, may not serve as a contract bar, is wholly without merit. The collective-bargaining agreement contains no express provision for prior ratification. Because it was executed prior to the filing of the petition seeking representation of the SSA Main facility bargaining unit, the absence of ratification does not exclude the agreement from serving as a contract bar to the petitions.

Finally, the Petitioner contends that the merger between FOPSCO and SPFPA lacked the requisite due process standards as required by Board law and, consequently, the bargaining unit members cannot have intended SPFPA to succeed FOPSCO as their exclusive bargaining representative.

According to the Board's recent decision in *Allied Mechanical Services*, an employer's duty to recognize and bargain with the incumbent union continues following the union's merger or affiliation unless the union's members did not have an adequate opportunity to participate in a vote on the merger, the vote was conducted without adequate due process safeguards, or the merger caused changes so significant that substantial continuity was lost between the pre- and post-affiliation union. 341 NLRB No. 141 (2004) (citing *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 199 (1986); *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 945 (1993), enfd. 32 F.3d 390 (8th Cir. 1994).

In the present case, the record establishes that FOPSCO union members were given adequate notice and opportunity to participate in the merger vote. On December 13, 2003, approximately four months prior to the merger vote, the plans for the merger were first announced to the union members at a general union membership meeting, the first of several similar meetings at which the merger was discussed. In addition, FOPSCO sent two letters to all dues-paying members, one from then-national president Howard Johannssen and another from 2nd vice-president Willie Jones, which further discussed the merger plans and encouraged the members to vote.

As described more fully above, a secret mail ballot election was then conducted by ESC utilizing the addresses of all union members as provided by the Employer. In those cases in which ballots were returned to ESC due to incorrect addresses, efforts were made to obtain the correct address in order to send the union member a second ballot in time for

he or she to cast their ballot prior to the deadline. At the conclusion of the voting period, the ballots were counted by ESC employees. ESC then issued its certification of the election results.

Following the merger, the uncontroverted evidence established that the transition from FOPSCO to SPFPA was seamless and uneventful. There was no significant change in the workplace operations, nor in the security work performed by the bargaining unit members. In fact, Petitioner witnesses Ballard, Barksdale, Denton and Turner, each of whom were dues-paying nonmembers of the bargaining units, testified that they were not even aware of the transition from FOPSCO to SPFPA until well after the May 1, 2004 merger date.

The Petitioner has challenged the validity of the merger vote on the ground that it did not include an opportunity for non-members of the bargaining unit to vote. It is undisputed that only dues-paying members were provided notice and given an opportunity to participate in the merger vote. In *Seattle-First National Bank*, *supra*, however, the Supreme Court invalidated a Board rule requiring "that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." 475 U.S. at 209. Consequently, there is no merit to the Petitioner's argument that there was any obligation to include non-members in the merger vote.

In light of the above, I find the merger vote satisfied all requirements as set forth by the Board in *Allied Mechanical Services*. First, FOPSCO, through its membership meetings and correspondence, provided adequate notice of, and an opportunity to participate in, the merger vote to all union members in the bargaining unit. Second, the merger vote conducted by ESC through a secret ballot mail election adequately protected all due process safeguards. Third, the merger failed to cause any loss in continuity between the representation of FOPSCO and the post-merger union of SPFPA.

CONCLUSION

Based on the foregoing, I find the Intervenor has presented evidence sufficient to support its position that the Petitioner's representation petitions are barred by the existing collective-bargaining agreements between the Employer and the Intervenor at the SSA Main and Metro West facilities. The record evidence has established that these agreements are in writing, were signed by all parties prior to the filing of the instant petitions, contain substantial terms and conditions of employment, and encompass appropriate bargaining units. *Appalachian Shale Products Co.*, supra. As found above, I reject the Petitioner's conditions that there is no contract bar because the contracting union is defunct, no ratification vote was held, and/or the merger between FOPSCO and SPFPA lacked due process safeguards. In addition, with regard to the contract at SSA Main, I find that, in essence, the modified or substitute collective-bargaining agreement was nothing more than a convenient method for the parties to the existing agreement to memorialize certain mutually agreed-upon modifications to that agreement. Such mid-term modifications do not remove the contract as a bar to an election based upon an otherwise prematurely filed

petition. *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1003 (1958). Accordingly, I dismiss the petitions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on OCTOBER 15, 2004. The request may not be filed by facsimile.

/s/Wayne R. Gold

Wayne R. Gold, Regional Director
National Labor Relations Board
Region 5

Dated: October 1, 2004